

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE KABONI,

Defendant-Appellant.

UNPUBLISHED

March 17, 2005

No. 253798

St. Clair Circuit Court

LC No. 03-002002-FH

Before: Owens, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than murder. MCL 750.84. He was sentenced to serve three to ten years in prison. He now appeals, and we affirm in part and remand in part.

Defendant first argues that he was denied a fair trial due to improper arguments by the prosecutor during closing argument. Defendant failed to preserve this issue by objecting in the trial court. Accordingly, we review this issue for plain error which affected his substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). In *Carines*, *supra* at 763, the Michigan Supreme Court, relying on the decision in *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), described the plain error rule as follows:

The *Olano* Court emphasized that a constitutional right may be forfeited by a party's failure to timely assert that right. *Id.*, p 731. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.*, pp 731-734. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*, p 734. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*, pp 736-737.

Defendant cites two categories of alleged misconduct by the prosecutor during closing argument: (1) that the prosecutor urged the jury to convict defendant because of his gang membership and (2) the prosecutor improperly disparaged defense counsel.

With respect to defendant's gang membership, the import of the prosecutor's argument was that the attack was gang motivated; that is, the gang was trying to teach the victim "a lesson" and that violence is how gangs teach their lessons. A defendant's motive is relevant. Therefore, an argument advancing a motive is proper. *People v Flynn*, 93 Mich App 713, 721-722; 287 NW2d 329 (1979); see also *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Accordingly, we are not persuaded that the argument regarding gang membership constituted plain error.

With respect to the claim that the prosecutor improperly disparaged defense counsel, we are not persuaded that the prosecutor did so. Defendant does not specifically quote any allegedly improper argument by the prosecutor. Rather, the defendant refers generally to six pages of the transcript, arguing that the prosecutor disparaged defense "tactics" during that portion of the closing argument. In that portion of the transcript, the prosecutor did describe various activities by defense counsel during the trial as "defense tactics." In doing so, the prosecutor was largely suggesting that defense counsel was trying to direct attention away from the significant issues in the case. This hardly constitutes a remark that improperly disparages defense counsel. See *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Accordingly, we again are not persuaded that the argument constituted plain error.

Defendant's other issue on appeal is that the trial court erred in scoring the sentencing guidelines. Specifically, defendant argues that the trial court erred in scoring fifty points for Offense Variable Seven and ten points for Offense Variable Nine. The problem presented in this case is that, while defendant did challenge the scoring, the trial court did not really resolve the matter. The co-defendants were sentenced before defendant and apparently challenged the scoring of Offense Variable Seven as well, which the trial court rejected. At defendant's sentencing, defense counsel indicated that he had heard the trial court's resolution of the issue at the earlier sentencing of co-defendant Scandalito, but nevertheless wished to raise the issue on defendant's behalf. The prosecutor informs us that the sentencing of Scandalito has never been transcribed, but refers us to the comments made by the trial court at the sentencing of another co-defendant, Brian Middleton—a transcript which is not part of the record before us.

While the trial court may have given an eloquent explanation of the scoring in the sentencing of one or more of the co-defendants, the fact remains that no such explanation was offered in the case at bar. Indeed, the closest the trial court came to resolving defendant's objections to the scoring of these two variables was (1) a comment to the probation officer that the court believed the probation officer was correct in the scoring of Offense Variable Nine and (2) during the explanation for the sentence imposed, references to the "horrendous" beatings and the victim suffering "serious injuries."

In short, to fully evaluate this issue we need the benefit of the trial court's reasoning. Accordingly, we remand the matter to the trial court for the purpose of more fully addressing defendant's challenges to the scoring of Offense Variables Seven and Nine. If the trial court determines that it should have accepted defendant's challenge to one or both of those Offense Variables, it may proceed with resentencing. In any event, the trial court shall file with this

Court a copy of the transcript of the hearing on remand within twenty-eight days of that hearing for our review and resolution of defendant's challenge.

Affirmed in part and remanded in part. We retain jurisdiction.

/s/ Donald S. Owens

/s/ David H. Sawyer

/s/ Helene N. White